2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 7

SELF-INCRIMINATION

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Outline of Instruction

I. UNITED STATES V. DICKERSON: THE COURT PUTS THE *MIRANDA* DEBATE TO BED.

United States v. Dickerson, 120 S. Ct. 2326 (2000). In *Dickerson* the Supreme Court finally puts to rest the question of whether the procedural safeguard created in *Miranda v. Arizona* were Constitutionally required. The Court concluded they are.

1. **Name**: *US v. Dickerson*.
   Cite: 120 S. Ct. 2326 (2000).
   Facts: the accused was indicted for bank robbery, conspiracy and using a firearm in a robbery. Before trial the accused moved to suppress a statement he made to the FBI claiming he was never read is *Miranda* rights. The trial court suppressed the statement for failure to provide the accused the warning required by *Miranda*. The U.S. Court of Appeals for the Fourth Circuit reversed the District Courts ruling. The Fourth Circuit Court agreed with the District Court that the accused had not received his *Miranda* warnings, but the Fourth Circuit held the statements were admissible under 18 U.S.C. 3501. Shortly after *Miranda* was decided the Congress passed 18 U.S.C. 3501, which stated that if a statement was voluntarily given it would be admissible (regardless of whether *Miranda* warnings were given). The Fourth Circuit concluded that the Supreme Court's decision in *Miranda* was not a Constitutional holding and therefor Congress could legislate this issue.
   Holding: the Supreme Court reversed, holding that *Miranda* was a constitutional holding and as such Congress could not overrule them.
   Law: the Court held that Congress does have the authority to modify or set aside judicially created rules of evidence and procedure that are not required by the Constitution BUT Congress may not legislatively supersede the Court's interpretation of the Constitution. The case turned on whether Miranda and its progeny announced a Constitutional rule or just a regulatory rule for the federal courts. The Court held that Miranda and its progeny were interpretations of the Constitution

II. 5TH AMENDMENT AND *EDWARDS* BAR.

1. **Name:** *U.S. v. Mosley*.
Cite: 52 M.J. 679 (Army Ct. Crim. App. 2000).
Issue: did the judge abuse his discretion in not suppressing the accused statement to investigators when it was made after a previous invocation of the 5th Amendment right to counsel just 24 hours before?
Holdings: no, the judge did not abuse his discretion.
Facts: the accused was questioned by one group of CID agents regarding two larcenies. During the investigation the accused invoked his right to counsel under the 5th Amendment. The CID agents stopped questioning immediately. Two other CID agents, who were working a separate investigation dealing with a larceny, approached the accused the following day (they were unaware that the accused had invoked his right to counsel). The agents read the accused his rights and told him they wanted to search his room. The accused indicated he understood his rights and did not want counsel present. When the accused was asked if he was willing to talk with investigators he responded by saying that the stolen items were not in his room but they were at a off-post apartment. The accused took investigators to the apartment where the stolen property was kept, the agents recovered evidence that incriminated the accused in both investigations. The accused then invoked his right to counsel.
Law: the Army Court begins by stating that once an accused invokes his right to counsel in a custodial setting, all questioning must cease and questioning can not resume unless counsel is present or the accused reinitiates further communication with the police. The court also pointed out that if the Government can demonstrate by a preponderance of the evidence that the accused was not in continuous custody and had a reasonable opportunity to seek counsel during the break in custody, a subsequent waiver by the accused could be valid. Whether the break in custody dissolves the *Edwards* bar is evaluated under a totality of the circumstances test. The court looked at the quality of the accused opportunity to seek legal counsel and found under the totality of the circumstances that the 24-hour break in custody was adequate for the accused to get counsel.

III. ARTICLE 31.

1. **Name:** U.S. v. Ruiz.
Cite: 54 M.J. 138 (2000).
Issue: there were two issues, first did the judge err in not suppressing a statement made by the accused to an AAFES store detective and second, was it error to allow trial counsel to cross examine the accused on why when he was confronted with an allegation of stealing he did not deny it?
Facts: store detectives witnessed the accused shoplift and leave an AAFES store. The store detectives followed the accused to the parking lot and requested that he return to the AAFES office with the detectives. The accused agreed to go. Once the detectives and the accused got to the security office one of the detectives stated "There seems to be some AAFES merchandise that hasn't been paid for." The accused responded "Yes." He took the stolen item out of his pocket and put on the table and said "You got me." At trial the accused testified stating that he had never left the building when the detectives detained him. The accused claimed when he went to the security office he said he could pay for the items he had and the detective said it's too late. On cross-examination the trial counsel asked the accused what too late meant and whether he had protested his innocence. Trial counsel pointed out how unreasonable the accused's version of the facts were. Holding: the statement was admissible and the cross-examination and argument were perfectly appropriate.
Law: the CAAF held that the AAFES detective had not interrogated the accused. Regarding the cross-examination and argument the court concluded that the trial counsel had not been commenting on the accused's right to remain silent but on the credibility of his version of what occurred.

2. **Name:** U.S. v. Swift.
Cite: 53 M.J. 439 (2000).
Issue: did the judge err by not suppressing a statement made by the accused to his first sergeant without the benefit of article 31 warnings and can an unwarned statement be used as the basis for a false official statement charge?
Facts: the accused's commander received a phone call from the accused's wife that she had been called by a woman claiming to be the new Mrs. Swift (the accused's wife was living apart from but had not gotten a divorce from). The first sergeant was informed, looked up bigamy in the MCM and then confronted the accused. The accused claimed to have gotten a divorce from his first wife. The first sergeant reminded the accused just a few months earlier he had stated he was still married to his first wife. The first sergeant demanded the accused produce the divorce decree. After several days the accused produced what he claimed to be a divorce decree (complete with spelling errors) supposedly signed by a county circuit court judge. The accused was charged with making false statements, obstructing justice, and bigamy. The defense sought to suppress the statements the accused made and the divorce decree.
Holding: the statements were suppressed, the divorce decree was admissible. **Law:** the court examined whether at the time of questioning by the first sergeant the accused was a suspect and whether the questioning was for an official or law enforcement purpose. The court first determined that the accused was a suspect at the time of the questioning. Although a mere hunch may not be enough to have an individual be a suspect the first sergeant had plenty of evidence to consider the accused a suspect. Next the court concluded that the Government had failed to overcome the strong presumption that the first sergeant was acting in a law enforcement or disciplinary capacity when question the accused about his alleged bigamy. Next the court states that the Government can not use an unwarned statement as the basis for prosecution for a false official statement. Finally the court concluded that the divorce decree was not protected under article 31 or the 5th Amendment. A document prepared in advance of questioning can not be considered compelled testimony and because the accused had already produced it for DEERs personnel the act of producing the document was not protected either.

IV. IMMUNITY.

Name: *U.S. v. Hubbell*.
Cite: 120 S. Ct. 2037 (2000).
Facts: the accused entered into a pretrial agreement with members of the Independent Counsel's Office regarding his conduct in the Whitewater banking scandal. One aspect of the agreement was that he cooperate with the Government and be truthful. Subsequent to the plea the Independent Counsel's Office served the accused with a subpoena for certain documents, to which the accused invoked his privilege against self-incrimination. The Government gave the accused immunity under 18 U.S.C. 6002 and the accused gave the Government the requested documents. The Government then sought to use the documents against the accused in a subsequent prosecution.
Holding: the Government had violated the accused privilege against self-incrimination.
Law: the Court held that although the documents that the accused turned over were not protected by the 5th Amendment the act of turning them over was testimonial conduct (because the Government did not know that the accused had them) and thus was protected.

V. VOLUNTARINESS.

Name: U.S. v. Murray.
Cite: 52 M.J. 671 (N. M. Ct. Crim. App. 2000).
Issue: could the Government use the accused's testimony from the first trial in the rehearing where the accused's testimony came about as a result of ineffective assistance of counsel?
Facts: the accused was charged with rape, indecent acts, and indecent liberties with a child. The accused was found guilty and sentenced to 20 years confinement, DD, reduction to the lowest enlisted rank and total forfeitures. After the trial was over through a post-trial 39a session and on appeal the accused's sentence and conviction was overturned due to ineffective assistance of counsel. At the second trial the Government used (over defense objection) the accused's testimony from the first trial.
Holding: the Government could not use the testimony from the first trial at the second.
Law: the Navy Court ruled that the testimony in the first trial came about through the ineffective assistance of counsel that caused the first conviction to be overturned. Because the testimony was given in violation of the accused's right to effective assistance of counsel it was not voluntary within the meaning of M.R.E. 310(e).

VI. USE OF INVOCATION OF RIGHTS AGAINST AN ACCUSED.

A. **Name**: *Portuondo v. Agard*.
Cite: 120 S. Ct. 1119 (2000).
Issue: was it constitutional for the prosecutor during argument to call the jury's attention to the fact that the defendant had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly.
Facts: the accused was tried for forcible sodomy, assault, and several weapons charges. The case came down to a battle of credibility, the accused claimed he had consensual intercourse with the victim. The victim and a friend said it was without consent and under threats of death. Defense focused on credibility during its summation, as did the Government. Government argued (over defense objection) "you know ladies and gentlemen, unlike all the other witnesses in this case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies. That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?…He's a smart man. I never said he was stupid….He used everything to his advantage." The accused was convicted of one count of sodomy and a weapons charge. The sodomy charge was upheld on appeal.
Holding: the prosecutor's comments were permissible.
Law: Justice Scalia, writing for the majority, pointed out that there was no precedent for what the defendant was asking for. The closest analogy is that from *Griffin v. California*, 85 S. Ct. 1229 (1965). In *Griffin*, the Supreme Court forbid prosecutors or trial courts from encouraging juries to use an individual's silence as evidence of guilt. Here the Defendant argued that *Griffin* should be extended to include the situation where the Government claims the defendant has had the opportunity to tailor his testimony. Justice Scalia pointed out several cases where the Court has held that when a defendant takes the stand he is to be treated just like any other witness. The Government's argument went to the credibility of the defendant.

B. **Name:** *U.S. v. Loomis*.
Cite: Army Ct. Crim. App. 9800077 (August 2000).
Issue: did the judge err by not *sua sponte* declaring a mistrial where the CID agent referred 5 times to the accused invoking his right to remain silent?

Facts: the accused was convicted of assaulting his eight-month-old daughter, an assault that produced a broken arm. He was sentenced to a BCD, total forfeitures for 3 months, reduction to E1, and confinement for 3 months. During the testimony of a CID agent, the agent repeatedly referred to the accused's invocation of his right to remain silent and right to counsel. During direct, the agent stated "he said or indicated that he wanted to speak to an attorney before answering any other questions…the minute he indicated that he needs an attorney or if he wants to talk to an attorney, I cannot ask him anymore question…I know we terminated or we stopped talking at the interview when he said he wanted a lawyer at 1:00." On cross, the agent said,"when the interview terminated, was when he indicated he wanted an attorney…it wasn't until after he had requested an attorney and the interview terminated was when he started talking about how he faked the fall." The accused's civilian defense counsel did elicit some the reference to the accused's invocation of his rights. The accused's military defense counsel did raise the judge's failure to instruct the panel members to disregard the testimony.
Holdings: yes, the findings of guilt were set aside.
Law: a suspect's lawful invocation of his rights to remain silent and or assistance of counsel during an investigation is inadmissible against him. Even if the defense did not object because they wanted the accused's invocation in to evidence, the judge still had a duty to inquire into this area and give a limiting instruction.

VI. CONCLUSION.